UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Ex parte HIMANSHU S. SINHA

Appeal No. 2006-0509
Application No. 09/425,088

ON BRIEF

Before HAIRSTON, JERRY SMITH, and DIXON, Administrative Patent Judges.
HAIRSTON, Administrative Patent Judge.

DECISION ON APPEAL

This is an appeal from the final rejection of claims 1 through 5 and 7 through 17.

The disclosed invention relates to a service level agreement manager disposed between a client computer system and a service provider computer system. The service level agreement manager comprises an admission controller that controls admission of the client computer system to a service implementation at the service provider, a performance measurement module in communication with the admission

controller, and a specification module in communication with the admission controller and the performance measurement module. The performance measurement module is configured to measure performance of the service implementation, and to modify an estimated capacity of the service provider based on the measured performance.

Claim 1 is illustrative of the claimed invention, and it reads as follows:

1. In a system having a client computer system and a service provider computer system programmed with a service implementation, an apparatus comprising:

a service level agreement manager disposed between the client computer system and the service implementation, the service level agreement manager comprising:

an admission controller configured to control admission of the client computer system to the service implementation using a service level agreement;

a performance measurement module in communication with the admission controller and configured to:

measure performance of the service implementation, and

modify an estimated capacity of the service provider based on the measured performance; and

a specification module in communication with the admission controller and with the performance measurement module.

The references relied on by the examiner are:

Aronberg et al. (Aronberg)	6,117,188	Sept. 12, 2000 (filed Apr. 27, 1998)
Somers	6,243,396	June 5, 2001 (filed Apr. 15, 1998)

Tunnicliffe et al. (Tunnicliffe)	6,272,110	Aug. 7, 2001 (filed May 20, 1998)
Knight et al. (Knight)	6,442,608	Aug. 27, 2002 (filed Jan. 14, 1999)
Ball et al. (Ball)	6,446,200	Sept. 3, 2002 (filed Mar. 25, 1999)

Claims 1 through 5, 7 through 10 and 12 through 14 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Somers in view of Tunnicliffe.

Claims 11 and 15 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Somers in view of Tunnicliffe and Ball.

Claims 16 and 17 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Somers in view of Tunnicliffe, Aronberg and Knight.

Reference is made to the brief and the answer for the respective positions of the appellant and the examiner.

OPINION

We have carefully considered the entire record before us, and we will reverse the obviousness rejections of claims 1 through 5 and 7 through 17.

All of the claims on appeal require that the performance management module modify an estimated capacity of the service provider based on a measured performance of the service implementation programmed in the service provider computer system.

The examiner acknowledges (answer, page 4) that the service level agreement in Somers between an authority and a customer (column 10, line 66 through column 11, line 48) "does not explicitly teach modifying an estimated capacity . . . of the service provider based on the measured performance." According to the examiner (answer, page 4), "Tunnicliffe teaches a system for measuring performance of a service implementation and modifying an estimated capacity of a service provider based on the measured performance (col. 6, lines 53-67 and col. 7, lines 1-3)." Based upon the teachings of Tunnicliffe, the examiner concludes (answer, page 4) that "[i]t would have been obvious to one of ordinary skill in the Computer Networking art at the time of the invention to combine the teachings of Somers regarding a service level agreement implementation with the teachings of Tunnicliffe regarding modifying an estimated capacity based on the measured performance because changing an estimated capacity provides more flexibility for clients (Tunnicliffe col. 1, lines 11-35)."

Appellant argues (brief, page 8) that "the mere fact that Tunnicliffe discloses determining a short-term demand on a network does not mean that Tunnicliffe discloses or suggest[s] modifying an estimated capacity of the service provider based on the measured performance," and that "the alleged motivation (i.e., to provide more flexibility for clients) is merely a conclusory statement regarding an alleged benefit of the combination."

We agree with appellant's arguments. Nothing in Tunnicliffe teaches or would have suggested to one of ordinary skill in the art modifying an estimated capacity of the service provider based on a measured performance of a service implementation. The mere speculation of the examiner as to the benefit (i.e., "more flexibility for clients") of the applied prior art cannot serve as the basis of a finding of obviousness. Only the objective teachings of the prior art or knowledge generally available to one of ordinary skill in the art can be used by the examiner in an obviousness determination. See In re Lee, 277 F.3d 1338, 1344, 61 USPQ2d 1430, 1434 (Fed. Cir. 2002). In summary, the 35 U.S.C. § 103(a) rejection of claims 1 through 5, 7 through 10 and 12 through 14 is reversed because a prima facie case of obviousness has not been established by the examiner.

The 35 U.S.C. § 103(a) rejection of claims 11 and 15 is reversed because the teachings of Ball do not cure the noted shortcomings in the teachings of Somers and Tunnicliffe.

The 35 U.S.C. § 103(a) rejection of claims 16 and 17 is reversed because the teachings of Aronberg and Knight do not cure the noted shortcomings in the teachings of Somers and Tunnicliffe.

DECISION

The decision of the examiner rejecting claims 1 through 5 and 7 through 17 under 35 U.S.C. § 103(a) is reversed.

REVERSED

KENNETH W. HAIRSTON
Administrative Patent Judge

JERRY SMITH
Administrative Patent Judge

JOSEPH L. DIXON
Administrative Patent Judge

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